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Ethical Issues Raised by the OLC Torture Memorandum  
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## Ethical Issues Raised by the OLC Torture Memorandum

Kathleen Clark\*

### INTRODUCTION: A TALE OF TWO MEMOS

In the fall of 2001, the Bush administration was looking for a place to imprison and interrogate alleged al Qaeda members away from the prying eyes of other countries and insulated from the supervision of United States courts.<sup>1</sup> The Defense Department believed that the Naval Base at Guantánamo Bay, Cuba might work, so it asked the Justice Department's Office of Legal Counsel (OLC) whether federal courts would entertain habeas corpus petitions filed by prisoners at Guantánamo, or whether they would dismiss such petitions as beyond their jurisdiction. On December 28, 2001, OLC responded with a thorough and balanced analysis of how the federal courts were likely to resolve the jurisdictional question.<sup>2</sup> The memorandum prepared by OLC explained the arguments against such jurisdiction,<sup>3</sup> but it also explored possible strengths in the opposing position.<sup>4</sup> The memorandum predicted that

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\* Professor of Law, Washington University School of Law, kathleen@wustl.edu. This article is based in part on Kathleen Clark & Julie Mertus, *Torturing the Law; The Justice Department's Legal Contortions on Interrogation*, WASH. POST, June 20, 2004, at B3, and a presentation made in San Francisco on January 8, 2005, at the Annual Meeting of the Association of American Law Schools. I am grateful for helpful comments from Sam Bagenstos, Howard Erichson, Ned Foley, Lawrence Fox, Stephen Gillers, Theresa Glennon, Leslie Griffin, Dawn Johnson, Russ Johnson, Peter Joy, Kate Kruse, Sanford Levinson, David Luban, Susan Martyn, Julie Mertus, Jesselyn Radack, Ronald Rotunda, Kim Lane Scheppele, Margo Schlanger, Ted Schneyer, Scott Silliman, William Simon, Bradley Wendel, Peter Wiedenbeck, John Williams, and Richard Zitrin, as well as from participants in a Washington University School of Law faculty workshop.

1. Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, §1, at 1 ("when searching for a place to detain hundreds of prisoners captured in Afghanistan . . . [e]very location it seriously considered . . . was outside the United States and, the administration believed, beyond the reach of the federal judiciary").

2. Memorandum for William J. Haynes II, General Counsel, Dept. of Defense, from Patrick F. Philbin & John C. Yoo, Deputy Asst. Attorneys General, *Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba*, Dec. 28, 2001, available at [http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB\\_127/01.12.28.pdf](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB_127/01.12.28.pdf) [hereinafter *Guantánamo Memorandum*]. This memorandum and a number of others relating to the treatment of detainees have been published in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *Greenberg & Dratel*].

3. *Guantánamo Memorandum*, *supra* note 2, at 1-5.

4. *Id.* at 6.

federal courts would not exercise jurisdiction but explained the risk of a contrary ruling.<sup>5</sup> Acting in reliance on this memorandum, the government started imprisoning and interrogating alleged al Qaeda members at Guantánamo the following month, cognizant of the risk that a federal court might find habeas jurisdiction.

In 2004, the Supreme Court considered habeas corpus claims by prisoners at Guantánamo, and reached a result contrary to that predicted by the Justice Department memorandum, ruling that the district court did have jurisdiction.<sup>6</sup> The fact that the Court came to a different conclusion than that advanced by OLC does not, however, mean that the OLC attorneys failed to fulfill their professional obligations to their client. The authors appropriately explained the risk of an adverse decision, and they provided enough information for the client to understand that risk and make decisions accordingly.<sup>7</sup>

Whenever a lawyer offers a legal opinion, there is always a possibility that other legal actors will take a contrary view. If that risk is substantial and the lawyer apprises the client of the magnitude of that risk, the lawyer has adequately advised and informed the client.<sup>8</sup> The authors of the Guantánamo Memorandum certainly met that standard.<sup>9</sup>

During the summer of 2002, CIA officials had grown frustrated with the interrogation of al Qaeda member Abu Zubaydah, who had stopped cooperating with his interrogators.<sup>10</sup> The CIA wanted to use harsher

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5. *Id.* at 1 (“We conclude that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at GBC [Guantánamo Bay, Cuba]. Nonetheless, we cannot say with absolute certainty that any such petition would be dismissed for lack of jurisdiction.”).

6. *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (holding that 28 U.S.C. §2241 gives the district court jurisdiction “to hear petitioners’ habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base”).

7. *See* Guantánamo Memorandum, *supra* note 2, at 1 (“While we believe that the correct answer is that federal courts lack jurisdiction over habeas petitions filed by alien detainees held outside the sovereign territory of the United States, there remains some litigation risk that a district court might reach the opposite result.”).

8. *See infra* Section II.

9. 1 GEOFFREY C. HAZARD, JR. & WILLIAM W. HODES, *THE LAW OF LAWYERING* §3.2, at 3-5 (3d ed. 2001) (“A thoughtful opinion on a difficult or unsettled question is not incompetent even if it later proves to have been wrong. . . . On the other hand, . . . failure to ascertain readily accessible precedents . . . may . . . be [a] violation[] of [Model] Rule 1.1.”) [hereinafter HAZARD & HODES].

10. Michael Hirsh, John Barry & Daniel Klaidman, *A Tortured Debate*, NEWSWEEK, June 21, 2004; Dana Priest, *CIA Puts Harsh Tactics on Hold; Memo on Methods of Interrogation Had Wide Review*, WASH. POST, June 27, 2004, at A1 (“The memorandum was drafted . . . to help the CIA determine how aggressive its interrogators could be during sessions with suspected al Qaeda members.”).

interrogation techniques against Zubaydah, and it sought the imprimatur of the Justice Department for those techniques.<sup>11</sup> In particular, agency officials were concerned that certain harsh techniques might violate the international Convention Against Torture and implementing federal legislation, which makes it a crime to engage in torture under color of law outside the United States.<sup>12</sup> White House Counsel Alberto Gonzales commissioned OLC to provide legal advice about the scope of the torture statute.<sup>13</sup> Gonzales specifically asked that OLC explore two of the elements of the crime of torture: (1) infliction of severe pain or suffering and (2) specific intent.<sup>14</sup> Deputy Assistant Attorney General John Yoo drafted a memorandum that was signed in August 2002 by Assistant Attorney General Jay Bybee, and which will be referred to here as the “Bybee Memorandum.”<sup>15</sup> The memorandum

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11. David Johnston, Neil A. Lewis & Douglas Jehl, *Nominee Gave Advice To C.I.A. on Torture Law*, N.Y. TIMES, Jan. 29, 2005, at A1 (“C.I.A. lawyers went to extraordinary lengths beginning in March 2002 to get a clear answer from the Justice Department about which interrogation techniques were permissible in questioning Abu Zubaydah and other important detainees. . . . ‘Nothing that was done was not explicitly authorized,’ a former senior intelligence said.”).

12. Mike Allen & Dana Priest, *Memo on Torture Draws Focus to Bush; Aide Says President Set Guidelines for Interrogations, Not Specific Techniques*, WASH. POST, June 9, 2004, at A3. 18 U.S.C. §2340A provides: “Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.” Torture within the United States could already be prosecuted under existing federal and state laws prohibiting assault, maiming, and other forms of brutality. The extraterritorial reach of the federal torture statute was necessary to implement the Convention Against Torture. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

13. See Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Asst. Atty. General, *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A*, Aug. 1, 2002 [hereinafter Bybee Memorandum], available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf>, reprinted in Greenberg & Dratel, *supra* note 2, at 172.

14. *Id.* at 3 (“You have asked us to address only the elements of specific intent and the infliction of severe pain or suffering.”).

15. John Yoo, *Behind the ‘Torture Memos;’ As Confirmation Hearings Near, Lawyer Defends Wartime Policy*, SAN JOSE MERCURY NEWS, Jan. 2, 2005, at 1P (acknowledging that he “helped draft” the Bybee Memorandum); Toni Locy & Joan Biskupic, *Interrogation Memo To Be Replaced*, USA TODAY, June 23, 2004, at 2A (identifying Yoo as “the memo’s principal author”).

There have been news reports of another August 2002 memorandum on torture issued by a different office within the Justice Department, analyzing the legality of specific proposed interrogation techniques. This other torture memorandum has not yet been leaked or otherwise made available to the public.

defined torture narrowly, developed defenses that might be raised in any future torture prosecution, and asserted that the President could authorize torture despite the treaty and statute prohibiting it. The government apparently acted in reliance on this memorandum in setting interrogation policies for alleged al Qaeda members.<sup>16</sup>

The Bybee Memorandum purported to provide objective legal advice to government decision makers.<sup>17</sup> Nevertheless, its assertions about the state of the law are so inaccurate that they seem to be arguments about what the authors (or the intended recipients) wanted the law to be rather than assessments of what the law actually is. The following section will describe the substantive inaccuracies in the memorandum. Section II will examine the legal ethics implications of those inaccuracies, with particular attention to the distinction between legal advocacy and legal advice.

### I. THE SUBSTANTIVE INACCURACIES IN THE BYBEE MEMORANDUM

The Bybee Memorandum consists of 50 pages of text supporting three assertions: (1) the federal criminal statute prohibiting torture is very narrow in

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Yoo is a law professor at the University of California at Berkeley whose views on unilateral executive branch authority in national security affairs were well known by the time he was chosen as a Deputy Assistant Attorney General. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996) (arguing that courts have no role in national security matters and that Congress's role is limited to its spending power and the impeachment process); John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169 (1999) (arguing that historical sources support unilateral executive branch power to initiate war). Bybee was also an academic before being appointed as Assistant Attorney General, and he too had written about executive branch power. See Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51 (1994); Adam Liptak, *Author of '02 Memo on Torture: 'Gentle' Soul for a Harsh Topic*, N.Y. TIMES, June 24, 2004, at A1.

16. There is both direct and indirect evidence of such reliance. Defense Department officials lifted much of the language from this OLC memorandum and incorporated it verbatim in their own report on interrogation practices. WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (2003) [hereinafter Working Group Report], at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/03.04.04.pdf>, reprinted in Greenberg & Dratel, *supra* note 2, at 286; see Appendix to this article (comparing the Bybee Memorandum with the Working Group Report); see also Douglas Jehl, David Johnston & Neil A. Lewis, *C.I.A. Is Seen as Seeking New Role on Detainees*, N.Y. TIMES, Feb. 16, 2005, at A16 (the August 1, 2002 memorandum was "sought by the C.I.A. to protect its employees from liability").

17. Bybee Memorandum, *supra* note 13, at 1 ("You have asked for our Office's views regarding the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment as implemented by Sections 2340-2340A of title 18 of the United States Code.").

scope, applying only where an interrogator specifically intends to cause the kind of extreme pain that would be associated with organ failure or death; (2) an interrogator who is prosecuted for violating the torture statute may be able to use an affirmative defense to gain an acquittal; and (3) the torture statute would be unconstitutional if it interfered with the President's war-making powers, including the power to detain and interrogate enemy combatants as he sees fit.<sup>18</sup> The memorandum's claims about the state of the law in each of these areas are grossly inaccurate.

The first major inaccuracy is in the memorandum's assertion that the federal criminal statute prohibiting torture applies only where a government official specifically intends to and actually causes pain so severe that it "rise[s] to . . . the level that would ordinarily be associated with . . . death, organ failure, or serious impairment of body functions."<sup>19</sup> This claimed standard is bizarre for a number of reasons. In the first place, organ failure is not necessarily associated with pain at all. In addition, this legal standard is lifted from a statute wholly unrelated to torture. It comes from a Medicare statute setting out the conditions under which hospitals must provide emergency medical care.<sup>20</sup> That statute mentions severe pain as one possible indicator that a person is in a condition calling for such care.<sup>21</sup> The statute goes on to define

18. The memorandum is divided into six sections. The first four sections address the scope of the torture statute and argue that only treatment that results in the most extreme pain constitutes torture. Section I examines the torture statute itself. Section II, which examines the ratification history of the Convention Against Torture, argues that the legal distinction between torture, on the one hand, and cruel, inhuman, and degrading treatment, on the other, supports the narrow definition of torture claimed in the first section. Section III, which examines cases decided under the Torture Victims Protection Act, and Section IV, which examines European and Israeli court decisions, also discuss the distinction between torture and cruel, inhuman and degrading treatment. Section V makes the separation of powers argument, and Section VI describes the defenses of necessity and self-defense and asserts that they will be available to interrogators who are prosecuted under the torture statute.

19. Bybee Memorandum, *supra* note 13, at 6. For criticism of this aspect of the memorandum, see David Luban, *Liberalism, Torture, and the Ticking Time Bomb*, in *THE TORTURE DEBATE IN AMERICA* (Karen J. Greenberg ed., 2006) 35, 57-59; Sanford Levinson, *In Quest of a "Common Conscience": Reflections on the Current Debate About Torture*, 1 J. NAT'L SECURITY L. & POL'Y 231 (2005); Harold Hongju Koh, *Testimony Before the Senate Judiciary Committee Regarding the Nomination of Alberto Gonzales as U.S. Attorney General*, Jan. 7, 2005, available at <http://www.law.yale.edu/outside/html/Faculty/index.htm>; Ruth Wedgwood & R. James Woolsey, *Law and Torture*, WALL ST. J., June 28, 2004, at A10 ("the OLC opinion bends over backwards to limit the definition of "severe pain or suffering" in a way that only Savoranola could love").

20. 42 U.S.C. § 1395w-22(d)(3)(B) (2000).

21. *Id.* The statute states:

The term "emergency medical condition" means a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that

“emergency medical condition” as one in which failure to provide medical care could result in “serious jeopardy” to an individual’s health, “serious impairment to bodily functions,” or “serious dysfunction of any bodily organ or part.” The Bybee Memorandum twists this legal standard, and asserts that “severe pain” occurs only in connection with a “serious physical condition or injury such as death, organ failure, or serious impairment of body functions.”<sup>22</sup> It purports to give interrogators wide latitude to cause any kind of pain short of that associated with “death, organ failure, or serious impairment of body functions.”

A second major inaccuracy is found in the memorandum’s discussion of defenses available to those who might be prosecuted for violating the federal torture statute.<sup>23</sup> The Bybee Memorandum discusses two affirmative defenses – necessity and self-defense – that could justify an interrogator’s decision to torture a prisoner in order to extract information about al Qaeda’s plans to attack other Americans. The memorandum’s analysis of the self-defense option is somewhat measured. It acknowledges that the self-defense option would be unconventional in two ways. First, the interrogator would not engage in torture to prevent harm to the interrogator himself. Rather, he would be preventing harm to other Americans who could be injured by a terrorist attack.<sup>24</sup> Second, the prisoner to be tortured would not actually be in a position to harm anyone at all. Instead, it is assumed that he would have information about an attack plan that would be carried out by others.<sup>25</sup> The Bybee Memorandum asserts that a government official charged with violating the torture statute could make a self-defense (or defense of another) argument, but it does not assert that such an affirmative defense

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a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in –

- (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,
- (ii) serious impairment to bodily functions, or
- (iii) serious dysfunction of any bodily organ or part.

22. Bybee Memorandum, *supra* note 13, at 6.

23. *Id.* at 39-46.

24. *Id.* at 43 (“The doctrine of self-defense permits the use of force to prevent harm to another person.”).

25. *Id.* at 44 (“To be sure, this situation is different from the usual self-defense justification. . . . Self-defense as usually discussed involves using force against an individual who is about to conduct the attack. In the current circumstances, however, an enemy combatant in detention does not himself present a threat of harm. He is not actually carrying out the attack; rather, he . . . merely has knowledge of the attack through his membership in the terrorist organization.”).

would necessarily succeed.<sup>26</sup> The memorandum also asserts that an interrogator charged with torture might well be able to gain an acquittal using the necessity defense.<sup>27</sup> Yet as David Luban has noted, the memorandum never mentions the fact that the Convention Against Torture itself seems to proscribe such a defense when it declares that “[n]o exceptional circumstances whatsoever, whether a state of war or . . . any other public emergency, may be invoked as a justification of torture.”<sup>28</sup> At a minimum, the Bybee Memorandum leaves the reader with the false impression that it is likely that an interrogator will be able to avoid a torture conviction by claiming the necessity defense.

A third major inaccuracy is found in the memorandum’s discussion of presidential authority. The Bybee Memorandum asserts that the President can, at least under some circumstances, authorize torture despite the federal statute prohibiting it. This position is based on an expansive view of inherent executive power,<sup>29</sup> but the memorandum does not even mention – let alone address – *Youngstown Sheet & Tube Co. v. Sawyer*, the leading Supreme Court case on this aspect of separation of powers.<sup>30</sup> *Youngstown*, colloquially known as the *Steel Seizure Case* because it invalidated President Truman’s seizure of the nation’s steel mills during the Korean War, seriously undermines any claim of unilateral executive power. The Bybee Memorandum does not even acknowledge that the Constitution explicitly grants to *Congress* the powers to define “Offences against the Law of Nations; . . . make Rules concerning Captures on Land and Water; . . . [and] make Rules for the Government and

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26. See *id.* at 42 (“a defendant could . . . appropriately raise a claim of self-defense”); *id.* (“we assume self-defense can be an appropriate defense to an allegation of torture”); *id.* at 43 (“Under the current circumstances, we believe that a defendant accused of violating Section 2340A could have, in certain circumstances, grounds to properly claim the defense of another. . . . Whether such a defense will be upheld depends on the specific context within which the interrogation decision is made”); *id.* at 45 (“we conclude that a government defendant may also argue that his conduct of an interrogation, if properly authorized, is justified on the basis of protecting the nation from attack”); *id.* at 46 (“we believe that [the defendant] could argue that his actions were justified by the executive branch’s constitutional authority to protect the nation from attack”).

27. *Id.* at 40 (“It appears to us that under the current circumstances the necessity defense could be successfully maintained in response to an allegation of a Section 2340A violation.”); *id.* at 41 (“While every interrogation that might violate Section 2340A does not trigger a necessity defense, we can say that certain circumstances could support such a defense.”).

28. Luban, *supra* note 19, at 66 (quoting Article 2(2) of the Convention Against Torture, *supra* note 12).

29. Bybee Memorandum, *supra* note 13, at 31-39.

30. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).



Regulation of the land and naval Forces,”<sup>31</sup> all of which suggest that Congress was well within its constitutional authority in banning torture.

On each of these three points – the threshold of pain that constitutes torture, the necessity defense, and unilateral executive power – the Bybee Memorandum presents highly questionable legal claims as settled law. It does not present either the counter arguments to these claims or an assessment of the risk that other legal actors – including courts – would reject them.<sup>32</sup> Despite these obvious weaknesses, the memorandum apparently became the basis for the CIA’s use of extreme interrogation methods, including “waterboarding,” and shaped Defense Department interrogation policy.<sup>33</sup> In fact, much of the memorandum was used verbatim in an April 2003 Defense Department Working Group Report on interrogation methods, which then became the basis for Defense Department policy.<sup>34</sup>

The legal analysis in the Bybee Memorandum was so indefensible that it could not – and did not – withstand public scrutiny. Press reports about and excerpts from the memorandum began to surface in early June, 2004, and there was a wave of criticism.<sup>35</sup> The Justice Department resisted congressional pressure to turn over the memorandum, insisting that the President had a right to confidential legal advice.<sup>36</sup> When *The Washington Post* posted the complete text of the memorandum on its Web site, the wave of criticism turned into a flood.<sup>37</sup> Eight days later, the Bush administration disavowed the

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31. U.S. CONST. art. I, §8, cls. 10, 11, 14; see Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689 (2004).

32. See Luban, *supra* note 19, at 56.

33. “Waterboarding” involves strapping a prisoner to a board and dunking him under water so that he feels like he is about to drown. Douglas Jehl & David Johnston, *C.I.A. Expands Its Inquiry into Interrogation Tactics*, N.Y. TIMES, Aug. 29, 2004, §1, at 10; see also Johnston, Lewis & Jehl, *supra* note 11 (reporting that the Justice Department approved the technique of “strapping a subject down and making him experience a feeling of drowning”).

34. See Working Group Report, *supra*, note 16. And see the Appendix to this article for a comparison of the Bybee Memorandum with the DOD Working Group Report. Unlike the Bybee Memorandum, the DOD Working Group Report provided additional legal analysis warning that its arguments are not accepted by other legal actors.

35. See Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture; Justice Dept. Gave Advice in 2002*, WASH. POST, June 8, 2004, at A1; Susan Schmidt, *Ashcroft Refuses to Release ‘02 Memo; Document Details Suffering Allowed In Interrogations*, WASH. POST, June 9, 2004, at A1.

36. Schmidt, *supra* note 35.

37. The Washington Post posted the memorandum on its Web site on June 14, 2004. See David Ignatius, *Small Comfort*, WASH. POST, June 15, 2004, at A23. Critical commentary on the memorandum included Stephen Gillers, *Tortured Reasoning; The U.S. Department of Justice Attorneys Who Advised the White House on Military Prisoner Policy Bear Responsibility – Both Ethical and Moral – for the Abuse Scandals*, AM. LAW., July 2004, at 65; Wedgwood &

memorandum.<sup>38</sup> Six months later, in December 2004, OLC issued a new torture memorandum that offered legal analysis that was more accurate, repudiating the Bybee Memorandum's analysis of "specific intent" and "severe pain," adopting a broader definition of torture, and omitting the troublesome sections claiming inherent presidential power to disregard the torture prohibition and the ready availability of criminal defenses to torture charges.<sup>39</sup>

## II. ETHICAL ANALYSIS OF THE BYBEE MEMORANDUM

The substantive inaccuracies in the Bybee Memorandum are so serious that they implicate the legal ethics obligations of its authors.<sup>40</sup> In analyzing the legal ethics implications, it is important to make three preliminary observations. First, lawyers who work for the federal government are subject to state ethics rules. In the late 1980s and early 1990s, Attorneys General Richard Thornburgh and Janet Reno asserted that the Constitution's Supremacy Clause gave the Justice Department the authority to exempt its lawyers from state ethics rules.<sup>41</sup> In 1998, however, Congress passed the McDade Amendment, making it clear that federal government lawyers must

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Woolsey, *supra* note 19. But see Eric Posner & Adrian Vermuele, *A 'Torture' Memo and Its Tortuous Critics*, WALL ST. J., July 6, 2004, at A22 (defending the memorandum and claiming that its "arguments are standard lawyerly fare, routine stuff").

38. See Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics Is Disavowed; Justice Document Had Said Torture May Be Defensible*, WASH. POST, June 23, 2004, at A1; Locy & Biskupic, *supra* note 15 (quoting a Justice Department official as saying, "We're scrubbing the whole thing . . . It will be replaced.").

39. Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Asst. Attorney General, *Legal Standards Applicable Under 18 U.S.C. §§2340-2340A*, Dec. 30, 2004, available at <http://www.usdoj.gov/olc/dagmemo.pdf>.

40. See Jim Lobe, *Give Rumsfeld the Pinochet Treatment*, INTER PRESS SERVICE NEWS AGENCY (May 25, 2005) <http://www.ipsnews.net/interna.asp?idnews=28823> (Amnesty International "called on state bar associations to investigate administration lawyers who helped prepare legal opinions that sought to justify or defend the use of abusive interrogation methods. . .").

41. See Memorandum from Richard Thornburgh, Attorney General, to All Justice Department Litigators (June 8, 1989), reprinted in *In re Doe*, 801 F. Supp. 478, 489-493 (D.N.M. 1992); Dept. of Justice, *Communications with Represented Persons*, 59 Fed. Reg. 39,910 (Aug. 4, 1994). The Justice Department resisted the application of several state ethics rules to federal prosecutors, including the restriction on a lawyer's contacting a person who is already represented by counsel (Model Rule 4.2) and the restriction on prosecutors' subpoenaing lawyers before grand juries (Model Rule 3.8). See Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000); Jesselyn Alicia Radack, *The Big Chill: Negative Effects of the McDade Amendment and the Conflict Between Federal Statutes*, 14 GEO. J. LEGAL ETHICS 707 (2001).

comply with state ethics rules in the states where they represent the government.<sup>42</sup> Both Jay Bybee and John Yoo were subject to the D.C. Rules of Professional Conduct. Bybee is licensed by the District of Columbia and thus was and is directly subject to those rules.<sup>43</sup> Yoo is licensed by Pennsylvania but was subject to the D.C. Rules by operation of the McDade Amendment, because he practiced in D.C. when he worked for the Office of Legal Counsel.<sup>44</sup>

Second, these OLC lawyers had as their client an organization – the executive branch of the United States government – rather than any individual officeholder.<sup>45</sup> Although White House Counsel Alberto Gonzales requested the Bybee Memorandum, he was not the client. Instead, he was simply a constituent of the organizational client. Ordinarily, lawyers must accept the decisions made by such constituents when those constituents are authorized to act on behalf of the organization.<sup>46</sup> But where a lawyer knows that a constituent is acting illegally and that conduct could be imputed to the organization, the lawyer must take action to prevent or mitigate that harm.<sup>47</sup>

42. 28 U.S.C. § 530B(a) (2000). The McDade Amendment provides:

An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

43. See [http://www.dcbarr.org/find\\_a\\_member](http://www.dcbarr.org/find_a_member) (indicating that Bybee has been a member since December 21, 1981).

44. When visited on June 16, 2005, the Web site for Boalt Hall School of Law at the University of California at Berkeley, <http://www.law.berkeley.edu/cenpro/ils/faculty/Yoocv.pdf>, indicated that Yoo is licensed by the Commonwealth of Pennsylvania. That information is no longer posted at the site.

An important but sometimes overlooked aspect of the McDade Amendment is that it subjects federal government lawyers to the rules not of their state of licensure, but those of each state where they are practicing on behalf of the government. See, e.g., Zacharias & Green, *supra* note 41, at 225 n.179 (assuming, incorrectly, that the McDade Amendment makes federal prosecutors subject to regulation of state where they are licensed). Thus, a federal government lawyer licensed in Pennsylvania but working for the Justice Department in Washington, D.C. is subject to the D.C. Rules of Professional Conduct.

45. See D.C. RULES OF PROF'L CONDUCT R. 1.13 (2004) [hereinafter D.C. RULES] ("Organization as Client").

46. *Id.* cmt. 4 ("When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful.").

47. *Id.* Comment 4 to Rule 1.13 sets out the lawyer's obligations:  
[W]hen the lawyer knows that the organization may be substantially injured by tortious or illegal conduct by a constituent member of an organization that reasonably might be imputed to the organization . . . it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the

Where the constituent can exercise control over the lawyer's future career, taking such action may jeopardize the lawyer's advancement. Nevertheless, the legal ethics rules require lawyers to take action to protect entity clients from harm committed by their constituents.

Third, in analyzing the performance of the lawyers who wrote the Bybee Memorandum, it is important to analyze whether they were acting as legal advisors or as legal advocates. Different ethics rules apply to these two distinct functions. The role of the lawyer as an advocate before a tribunal is a familiar one. In that role, the lawyer may make any legal argument as long as it is not frivolous.<sup>48</sup> She does not need to give the court her honest assessment of how the law applies in the case. Her only obligation of candor regarding legal argument is that if her opponent fails to mention directly adverse controlling authority, she must bring it to the tribunal's attention.<sup>49</sup>

When a lawyer gives legal advice, on the other hand, she has a professional obligation of candor toward her client. One finds this obligation in Rule 2.1, which states that in representing a client, "a lawyer shall . . . render candid advice."<sup>50</sup> In advising a client, the lawyer's role is not simply to spin out creative legal arguments. It is to offer her assessment of the law as objectively as possible. The lawyer must not simply tell the client what the client wants to hear, but instead must tell the client her best assessment of what

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matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. . . . Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

48. D.C. Rule of Professional Conduct 3.1 states: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law." D.C. RULES, *supra* note 45, R. 3.1 ABA Model Rule 3.1 is identical. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2003) [hereinafter ABA MODEL RULES]; *see also* FED. R. CIV. PROC. 11(b)(2) ("By presenting to the court . . . a pleading, . . . an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . the . . . legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law . . .").

49. D.C. Rule 3.3(a)(3) states: "A lawyer shall not knowingly . . . [f]ail to disclose to the tribunal legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to the lawyer to be dispositive of a question at issue and directly adverse to the position of the client . . . ." D.C. RULES, *supra* note 45, R. 3.3(a)(3). ABA Model Rule 3.3(a)(2) is nearly identical. ABA MODEL RULES, *supra* note 48, R. 3.3(a)(2).

50. D.C. RULES, *supra* note 45, R. 2.1. ABA Model Rule 2.1 is identical. ABA MODEL RULES, *supra* note 48, R. 2.1.

the law requires or allows.<sup>51</sup> Similarly, Rule 1.4(b) requires a lawyer to explain the law adequately to her client, so that the client can make informed decisions about the representation.<sup>52</sup>

David Luban has described this obligation of candor in the following way: In many areas of law, there is not absolute agreement among lawyers about the state of the law. In those situations, knowledgeable lawyers' opinions about the law usually fall somewhere in a range similar to the familiar bell curve. If a lawyer advises a client that the law is at an extreme end of that bell curve (rather than that the state of the law is where most knowledgeable lawyers would view it), then the obligation to give candid legal advice requires the lawyer to inform the client that the lawyer's interpretation is at the extreme end and not shared by most knowledgeable lawyers.<sup>53</sup>

51. Comment 1 to D.C. Rule 2.1 states that "a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." D.C. RULES, *supra* note 45, R. 2.1 cmt. 1. Model Rule 2.1 is identical. ABA MODEL RULES, *supra* note 48, R. 2.1. cmt. 1. A leading treatise on legal ethics explains:

[A] client may consult a lawyer to have her own preconceptions confirmed rather than to seek genuine advice. A lawyer may be tempted to play sycophant to such a client, to ensure continued employment. Rule 2.1 prohibits such an approach, however, first by requiring that a lawyer's advice be candid; and second, by requiring the lawyer to exercise judgment that is both independent and professional.

1 HAZARD & HODES, *supra* note 9, §23.2; *see also* ABA/BNA Lawyers' Manual on Professional Conduct 704 ("lawyers must . . . resist the urge to tell the client only what the client wants to hear and instead must give honest and straightforward advice, regardless of how unpleasant or unpalatable that advice might be."); Timothy L. Hall, *Moral Character, the Practice of Law, and Legal Education*, 60 MISS. L.J. 511, 533 (1990) ("Rule 2.1 relieves an attorney of any notion that serving as a client's 'yes man' is required.").

52. D.C. Rule 1.4(b) states: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." D.C. RULES, *supra* note 45, R. 1.4(b). Model Rule 1.4(b) is identical. ABA MODEL RULES, *supra* note 48, R. 2.1. *See* 1 HAZARD & HODES, *supra* note 9, §7.4 ("If the client is to make turning-point decisions about his legal affairs, he must be armed with sufficient information for intelligence decisionmaking."); Bilder & Vagts, *supra* note 31, at 693 ("unless public officials are given competent, objective, and honest advice as to the legal consequences of proposed actions and decisions, they cannot make informed and intelligent policy judgments or properly balance the national interests involved").

53. Telephone conversation with David Luban, Dec. 15, 2004. *See* David Luban, *Selling Indulgences: The Unmistakable Parallel Between Lynne Stewart and the President's Torture Lawyers*, SLATE, Feb. 14, 2005 ("Independence means saying what the law is – as mainstream lawyers and judges understand it – regardless of what the client wishes it to be. Candor requires lawyers with eccentric theories to warn their clients whenever their legal advice veers away from the mainstream."), *available at* [www.slate.com/id/2113447](http://www.slate.com/id/2113447); *see also* W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U L. REV. 1167 (2005) (arguing that "professionalism" requires lawyers who advise clients contrary to the views of the prevailing professional interpretive community to warn their clients of such inconsistency).

In giving legal advice, a lawyer may provide advice that is contrary to the weight of authority, spinning out imaginative, even “forward-leaning” legal theories for the client to use.<sup>54</sup> When doing so, however, the candor obligation requires the lawyer to inform the client that the weight of authority is contrary to that advice, and that other legal actors may come to the opposite conclusion. A lawyer who fails to warn a client about the possible illegality of proposed conduct has violated her professional obligations.<sup>55</sup>

If a lawyer fails to candidly advise a client, she harms the client and may harm others affected by the client’s actions. A lawyer who inaccurately advises a client that a proposed *legal* action is illegal may be foreclosing an option that should be open to the client’s consideration, usurping the client’s role in an attempt to limit the client’s options. Similarly, a lawyer who inaccurately advises a client that proposed *illegal* action is legal also harms the client. On one level, a client may want to hear that conduct she wants to engage in is legal, since that makes it easier for the client to engage in the desired activity. But the client may face serious long-term consequences for

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An alternative approach would allow a government lawyer to opine that the state of the law is at the extreme as long as she *publicly* explains and defends that position, allowing the public to assess and critique it. See *The Role of the Legal Adviser of the Department of State: A Report of the Joint Committee Established by the American Society of International Law and the American Branch of the International Law Association*, 85 AM. J. INT’L L. 358, 363 (1991) (“the most effective check on government advocacy of dubious or irresponsible legal positions will be the willingness of the Legal Adviser to publicly state, defend and be accountable for such arguments before other officials and Congress, the public and the community of international lawyers”).

54. See Golden, *supra* note 1 (“‘Legally, the watchword became “forward-leaning,”’ said a former associate White House counsel, Bradford Berenson, ‘by which everybody meant: “We want to be aggressive. We want to take risks.”’”); Michael Isikoff, Daniel Klaidman & Michael Hirsh, *Torture’s Path*, NEWSWEEK, Dec. 27, 2004 (quoting Alberto Gonzales as asking a meeting of White House and Justice Department lawyers regarding the preparation of this memo, “Are we forward-leaning enough on this?”) An unnamed lawyer who participated in the meeting recalled, “That’s a phrase I heard Gonzales use many times.” *Id.* But, at his confirmation hearings as the nominee to be Attorney General, Gonzales denied using that phrase.

SEN. KENNEDY: . . . did you ever talk to any members of the OLC while they were drafting the memoranda? Did you ever suggest to them that they ought to lean forward on this issue about supporting the extreme uses of torture? Did you ever, as reported in the newspaper?

MR. GONZALES: Sir, I don’t recall ever using the term sort of leaning forward in terms of stretching what the law is.

*Panel I of a Hearing of the Senate Judiciary Committee: The Nomination of Alberto Gonzales To Be Attorney General*, FEDERAL NEWS SERV., Jan. 6, 2005.

55. See *Summit, Rovins & Feldesman v. Fonar Corp.*, 213 A.D.2d 201 (N.Y. App. Div. 1995) (lawyer sued for negligently failing to predict and explain to client the likelihood that corporate strategy would not succeed).

such illegal conduct. While a client can choose to act illegally, the consequences of illegal conduct should not come as a surprise to the client. Just as a patient can take action that is contrary to medical advice, a client can take action even though it is against the law. But such a decision should not be accompanied by his lawyer's false assurance that the conduct is legal.

The harm to the client from failing to advise about the illegal character of proposed conduct may be even greater when the client is an entity rather than an individual. Indeed, a lawyer working for an entity client has an enhanced obligation to guard the interests of the entity against wrongdoing by the entity's constituents.<sup>56</sup>

The Bybee Memorandum purports to offer legal advice. Its authors, Jay Bybee and John Yoo, had an obligation to be candid with their client, the executive branch. The constituent who requested the Bybee Memorandum, then White House Counsel Alberto Gonzales, may have wanted a particular answer to his questions about the torture statute. But the OLC lawyers had a professional obligation to give accurate legal advice to their client, whether or not the client's constituent wanted to hear it. Based on the available facts, it appears that Bybee and Yoo failed to give candid legal advice, violating D.C. Rule 2.1, and that they failed to inform their client about the state of the law of torture, violating D.C. Rule 1.4.

Because of the secrecy surrounding the Bush administration's torture policy, we do not know exactly what techniques have been used against prisoners, or whether CIA interrogators or managers were informed of the Bybee Memorandum. With Congress controlled by the President's party and no Independent Counsel statute in place, it is unclear how or when the facts surrounding the torture policy will be revealed.<sup>57</sup>

If bar disciplinary authorities investigate Yoo and Bybee, these two attorneys will have an opportunity to explain or defend their actions. In that setting, they might assert that the ethical obligations of candor and adequately informing their client did not apply because the Bybee Memorandum was never intended as legal advice in the traditional sense. In fact, David Luban and other scholars have speculated that this Bybee Memorandum was not intended as legal advice at all, but instead as an immunizing document, to ensure that CIA officials who engage in torture would not be prosecuted for that conduct.<sup>58</sup> Indeed, the Bybee Memorandum might prove helpful to

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56. D.C. RULES, *supra* note 45, R. 1.13.

57. A few members of Congress are seeking to establish an independent commission to examine allegations of interrogation abuse, but the Bush administration has resisted such efforts. Josh White & R. Jeffrey Smith, *White House Aims To Block Legislation on Detainees*, WASH. POST, July 23, 2005, at A1.

58. See Luban, *supra* note 19, at 55.

torturers in avoiding domestic criminal accountability. It is unlikely that even a future administration would prosecute government officials who relied on an OLC memorandum for the legality of their actions, because to do so would undermine future government officials' reliance on OLC opinions more generally.

But if the authors of the Bybee Memorandum intended to immunize torturers in this way, they might have violated a different ethical rule, D.C. Rule 1.2(e), which prohibits an attorney from assisting a client's criminal conduct.<sup>59</sup> So even if their memorandum successfully immunizes torturers from criminal prosecution, it might jeopardize its authors' licenses to practice law.<sup>60</sup>

### CONCLUSION

Why would otherwise competent and skilled lawyers ever risk violating the ethics rules that require candid legal advice and adequate informing of clients? Yoo has publicly defended the Bybee Memorandum in general terms but has not addressed its substantive inadequacies.<sup>61</sup> Bybee, now a judge on the United States Court of Appeals for the Ninth Circuit, has remained silent.<sup>62</sup> Perhaps Yoo and Bybee thought that they would never have to explain their legal advice because the Bybee Memorandum would never be made public. Perhaps they thought that Bush administration actions based on their advice

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59. D.C. Rule 1.2(e) states: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . ." D.C. RULES, *supra* note 45, R. 1.2(e). Model Rule 1.2(d) is identical. ABA MODEL RULES, *supra* note 48, R. 1.2(d).

60. Alternatively, John Yoo might argue that he wrote the Bybee Memorandum at the direction of Jay Bybee or Alberto Gonzales, and that he was merely a subordinate lawyer, relying on the judgment of his supervisors. Subordinate lawyers can rely on "a supervisory lawyer's reasonable resolution of an arguable question of professional duty." D.C. RULES, *supra* note 45, R. 5.2(b). Model Rule 5.2(b) is identical. ABA MODEL RULES, *supra* note 48, R. 5.2(b). Such a defense would not succeed, however, if violations of Rule 2.1 and 4.1 were determined to be clear, not arguable questions upon which reasonable minds could disagree.

61. John Yoo, *A Crucial Look at Torture Law*, L.A. TIMES, July 6, 2004, at B11; John Yoo, SAN JOSE MERCURY NEWS, *supra* note 15.

62. If the Bybee Memorandum had been available at the time that Bybee was nominated to the Ninth Circuit, Senators would likely have asked him about his legal conclusions. The Judiciary Committee members questioned White House Counsel Alberto Gonzalez extensively about his role in this memorandum even though he was the recipient – rather than an author – of this inadequate legal advice. See *Panel I of a Hearing of the Senate Judiciary Committee: The Nomination of Alberto Gonzales to Be Attorney General*, FEDERAL NEWS SERV., Jan. 6, 2005.



would never come to light.<sup>63</sup> Perhaps this advice reflected what they sincerely believed the law should be.

Bybee and Yoo are not the only government lawyers for whom the Bybee Memorandum may raise ethical concerns.<sup>64</sup> News reports indicate that several White House lawyers reviewed drafts of the Bybee Memorandum.<sup>65</sup> Did the White House lawyers object to the flawed analysis in the memorandum, or did they instead actually insist that the memorandum include such analysis?<sup>66</sup> Still other Bush Administration lawyers, DOD General Counsel William Haynes and Department of the Air Force General Counsel Mary Walker read the final Bybee Memorandum and insisted that it become the basis of Defense Department interrogation policy, despite the glaring legal inaccuracies apparent on its face.<sup>67</sup> The Defense Department's Working Group on Detainee Interrogations adopted the Bybee Memorandum nearly verbatim in its April 2003 report.<sup>68</sup> The Defense Department withdrew that Report in March, 2005, three months after the Justice Department issued a replacement of the August

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63. In contrast, the Bush administration recognized that it would likely face a court challenge of its decision to house prisoners in Guantánamo, and hence needed an accurate assessment of how courts would rule in such a case.

64. The Bybee Memorandum is not the only memorandum on torture issued by the Justice Department in August 2002. Another Justice Department memorandum written the same month and addressing the legality of specific proposed interrogation techniques has not yet been made public. Douglas Jehl, *C.I.A. Says Approved Methods of Questioning Are All Legal*, N.Y. TIMES, March 19, 2005, at A7; Johnston, Lewis & Jehl, *supra* note 11 (“when the [Central Intelligence Agency] asked about specific [interrogation] practices, Mr. Bybee responded with a second memorandum, which is still classified.”). We do not know whether that memorandum did a better job than the first in providing candid legal advice.

65. Other Bush administration lawyers reviewed the draft memorandum before it was finalized. Dana Priest, *CIA Puts Harsh Tactics on Hold; Memo on Methods of Interrogation Had Wide Review*, WASH. POST, June 27, 2004, at A1 (reporting that the memorandum was reviewed by lawyers at the National Security Council, by deputy White House counsel Timothy E. Flanigan, and by David S. Addington, counsel to the Vice President).

During the Senate Judiciary Committee's hearing on his nomination to be Attorney General, Alberto Gonzales resisted answering questions about his role in shaping the memorandum. See Johnston, Lewis & Jehl, *supra* note 11 (referring to “Gonzales's unwillingness to discuss his legal advice on the issue” of torture).

66. Dana Priest, *supra* note 65 (reporting that lawyer David Addington was “particularly concerned” that the memorandum “include a clear-cut section on the president's authority”); Neil A. Lewis & Eric Schmitt, *Lawyers Decided Bans on Torture Didn't Bind Bush*, N.Y. TIMES, June 8, 2004, at A1 (reporting that Addington was involved in Defense Department discussions of interrogation policy, which ultimately resulted in adoption verbatim of much of the language of the Bybee Memorandum).

67. See Lewis & Schmitt, *supra* note 66.

68. See Working Group Report, *supra*, note 16; Appendix to this article.

2002 Bybee Memorandum.<sup>69</sup>

Not all government lawyers accepted the patently inaccurate claims of the Bybee Memorandum. Career military lawyers who were involved in developing Defense Department interrogation policy objected to the Bybee Memorandum, and they went up the chain of command to register their objections.<sup>70</sup> The contrast between the career military lawyers, who objected to the Bybee Memorandum, and most of the politically appointed lawyers, who championed it, is quite striking, and it is worthy of more detailed study as more facts become public.<sup>71</sup>

This article's conclusion – that John Yoo and Jay Bybee apparently failed to comply with their ethical obligations to provide candid legal advice and to adequately inform their client – might seem somewhat insignificant compared to the serious human rights violations that have occurred in Guantánamo, Afghanistan, Iraq, and at secret CIA interrogation sites.<sup>72</sup> There will likely be long delays before any government officials are held criminally or otherwise accountable for those human rights violations. But bar disciplinary authorities have a responsibility to examine the conduct of the high-level Bush administration lawyers who wrote and propagated the Bybee Memorandum, and to hold them accountable if they violated their professional obligations.

69. Josh White, *Military Lawyers Fought Policy on Interrogations; JAGs Recount Objections to Definition of Torture*, WASH. POST, July 15, 2005, at A1.

70. *Id.* (“the judge advocate generals (JAGs) for the Army, Air Force and Marines” expressed their opposition in letters to Defense Department’s general counsel, but “the JAG concerns ultimately were overruled by the general counsel’s office”).

71. Not all politically appointed lawyers accepted the Justice Department’s position on torture. See Lewis & Schmitt, *supra* note 66 (noting that the State Department’s chief lawyer, William H. Taft, objected to the Justice Department’s conclusions); Jane Mayer, *The Memo: How an Internal Effort To Ban the Abuse and Torture of Detainees Was Thwarted*, NEW YORKER, Feb. 27, 2006, at 32. (Alberto J. Mora, General Counsel of the Navy, opposed adoption of John Yoo’s arguments in Defense Department’s Working Group Report).

Not all military lawyers showed such good judgment in assessing interrogation policy. An October 2002 memorandum by an Army lawyer at Guantánamo is also problematic in its legal analysis, claiming that harsh interrogation tactics such as the “use of a wet towel to induce the misperception of suffocation” do not violate the torture statute as long as it is used to obtain information rather than “maliciously or sadistically for the very purpose of causing harm.” Diane E. Beaver, Joint Task Force 170, Dept. of Defense, *Legal Brief on Proposed Counter-Resistance Strategies*, Oct. 11, 2002, at 5, 6, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.10.11.pdf>, reprinted in Greenberg & Dratel, *supra* note 2, at 229, 233, 235. This is a more explicit adoption of the same kind of “specific intent” analysis suggested by the August 2002 OLC memorandum. However, there is no indication that the author of this memorandum, Lt. Col. Diane Beaver, relied on or had access to the Bybee Memorandum.

72. Amnesty International, *United States of America: Human Dignity Denied; Torture and Accountability in the “War on Terror,”* Oct. 27, 2004, available at <http://web.amnesty.org/library/Index/ENGAMR511452004>.

**Appendix**  
**Comparison of**  
**DOD Working Group Report (April 2, 2003) and**  
**Bybee Memorandum (Aug 1, 2002)**

Topic	DOD Rpt §	Bybee Memo §	Comparison
Specific intent	III.A.1.a	I.A.	Verbatim, except for one change of tense
Severe pain/suffering	III.A.1.b	I.B.	Verbatim except DOD omits ¶ referring to hospital emergencies for pain
Severe mental pain/suffering	III.A.1.c	I.C.	Verbatim
Prolonged mental harm	III.A.1.c.i	I.C.1	Verbatim, except DOD alters last sentence, including saying that “may be” a complete defense where OLC said it “is” a complete defense
Harm caused by or resulting from predicate acts	III.A.1. c.ii	I.C.2	Verbatim, except for minor stylistic changes
Commander-in- Chief authority	III.A.3.a	V.B.	Verbatim, except: <ul style="list-style-type: none"> <li>● minor stylistic changes</li> <li>● refers to DOJ in 3rd person rather than 1st person</li> <li>● omits citations to previous OLC opinions</li> <li>● omits OLC n.19 (citing OLC opinion) &amp; n.22 (discussing detention of enemy combatants, including OLC opinion)</li> <li>● omits last sentence in first ¶ of §</li> <li>● omits § heading on p. 22</li> <li>● refers to “unlawful” combatants rather than “battlefield” combatants on p. 24</li> <li>● adds final ¶ on p. 24</li> </ul>
Necessity defense	III.A.3.b	VI.A	Verbatim, except minor stylistic changes
Self-defense	III.A.3.c	VI.B	Verbatim, except <ul style="list-style-type: none"> <li>● minor stylistic changes</li> <li>● adds cite to article by Alan Dershowitz on p. 29</li> </ul>